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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 209.

The State of Tennessee, Ex. Rel. G. L. Maloney, et al.

vs.

Stephen B. Cowden, et al.

BRIEF AND ARGUMENT FOR THE PLAINTIFFS IN ERROR.

J. W. GREEN,
PICKLE & TURNER,
for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 209.

The State of Tennessee, Ex. Rel. G. L. Maloney, et al.

vs.

STEPHEN P. CONDON, et al.

BRIEF AND ARGUMENT FOR THE PLAINTIFFS IN ERROR.

I.

STATEMENT OF THE CASE.

The contention of the Relators is that they have been deprived of liberty or property, and of the equal protection of the laws, in violation of the 14th Amendment of the Federal Constitution, by an unconstitutional statute of the State of Tennessee.

This is a statutory proceeding in the nature of *quo warranto,* brought in the name of the State, on the relation of certain citizens and office-holders, against the defendants. It is averred in the petition that the Relators G. H. Strong and T. A. Rambo were elected by the County Court of Knox County, Tennessee, Pike Commissioners, for the term of four years; that Relators Sam Vance, J. F. C. Herrell, S. L. England and I. L. White were elected in like manner Workhouse Commissioners of Knox County, for a term of two years each; that Relator G. L. Maloney is County Judge of said county, and is *ex officio* the Chairman of both of said Commissions; and that Relator R. L. Peters was

elected Superintendent of the Workhouse of said county for the term of four years, and that all of said officials had been duly qualified, and were filling and performing the duties of their said respective offices, and entitled to the emoluments of same, on and prior to the 16th day of February, 1901. They aver that their respective terms of office did not expire until some time subsequent to said date.

It is further averred that on the 8th day of February, 1901, the General Assembly of the State of Tennessee passed an Act repealing the statutes under which the Relators had been elected and were holding their said offices and receiving their emoluments, and substituted in their stead and room, a Board of Public Road Commissioners composed of three members.

Said Act authorized the Governor to appoint these Road Commissioners, and it is averred that on the 16th day of February, 1901, the Governor did appoint the defendants as members of this Board. It is further averred that the defendants have ousted the Relators of their said offices. This was done by mandatory injunction, as appears from the opinion of the Supreme Court of the State.

It is contended that said statute, under color of which the defendants ousted the Relators of their said offices and deprived them of the emoluments thereof, is illegal, null and void. This petition was dismissed on demurrer, and the Relators appealed to the Supreme Court of the State.

The Relators assigned as error in the Supreme Court of the State that said Act of February 8, 1901, was void under the 14th Amendment to the Federal Constitution.

Record, pp. 11-13.

The Supreme Court of the State affirmed the decision of the lower court, overruling all objections made to the constitutionality of said Statute, including that which insisted that said statute was in violation of the 14th Amendment. The Relators have prosecuted writ of error.

Prior to said Act of February 8, 1901, general statutes of the State had provided separate systems for the regulation of

public roads, for the regulation of turnpikes, and for the regulation of county workhouses. These statutes were general in their character. Under all of these statutes it was provided that the officials required for the management of these local affairs should be elected by the County Court, and Relators were in fact elected in conformity to these statutes, and were acting under them when ousted by the defendants.

The caption and such portions of the Act of February 8, 1901, as are material to the present inquiry are set out in Appendix A to this brief.

It will be observed that this Act purports to be general, though it is confined by its terms to counties having a population of not less than 70,000 nor more than 90,000, under the Federal Census of the year ~~1890~~ 1900 or any subsequent Federal Census.

Under the census of 1890, no county of the State had a population between 70,000 and 90,000. Under the census of 1900, which had been taken before the passage of the Act of 1901, only one of the ninety-six counties of the State had a population between those limits, and that one was Knox County, having, under that census, 74,304.

It will be observed of this Act that it contains no provision whatever in regard to the other ninety-five counties of the State. Under the Federal Census of 1900, of the other ninety-five counties of the State, two of them had a population exceeding 90,000, to-wit: Davidson, with a population of 122,815, and Shelby, with a population of 153,557; while the other ninety-three counties had, by that census, less than 70,000 population. The next largest county below Knox County, to-wit, Hamilton County, had a population of 61,695. Substantially the same conditions existed under the census of 1890, Davidson and Shelby Counties having more than 90,000, and all of the others, including Knox County, having less than 70,000.

While Knox County is not named, it is described by designation as certainly as if named, as the sole object at which this invidious and discriminating Act was leveled.

It will be observed that this Act is not one that deals with

the county in its corporate capacity, but the county is made to serve as a unit for the classification of citizens for road, turnpike, and workhouse purposes. These purposes are of a public and general nature. Contrary to all former usages and statutes, the three subjects of public roads, turnpikes and workhouses are combined in a single Act, and the power to appoint the Commissioners until the next general election is conferred upon the Governor. In no other Act ever passed in Tennessee regulating any of these subjects, has the power of appointment of the local officials been conferred upon the Governor of the State. It will be observed likewise that this Act subjects all of the male inhabitants of Knox County—the only county included within the description—between the ages of 18 and 50 years, to work on the public roads. It likewise requires the County Court to levy a tax upon all property in the districts outside of the corporate limits of cities and towns, for the purpose of improving dirt roads in the county, of not less than 10 cents nor more than 25 cents, and for the construction and improvement of macadam roads, a tax of not less than 10 nor more than 15 cents, on the $100, to be expended by the Commissioners.

See Session Acts 1901, Ch. 8.

At the same session of the General Assembly at which said Act was passed, another act embracing counties having a population of from 120,000 to 150,000, by the last or any succeeding Federal Census, provided that the present Road Commissioners should serve until their successors should be elected and qualified, which should be done at the general August election in 1902. This Act applied alone to Davidson County under the Federal Census of 1900. It makes a remarkable discrimination between Davidson and Knox Counties with reference to the manner in which Road Commissioners should be appointed or elected.

Session Acts of 1901, Ch. 55.

Shelby County, having a larger population, is excluded from the operation of this act, though purporting to be general in its terms, as are all the rest of the counties of the State—the other counties having less than 120,000 population.

At the same session of the Legislature another Act purporting to be general and applying to counties of 70,000 population and less, by the Federal Census of 1900, or any subsequent Federal Census, provided for the election of Road Commissioners by the County Court. It likewise provided that all the male residents of the county, between the ages of 21 and 45 years, should be subject to road labor, except those who have been exempted by the County Court for physical disability, etc., and that the County should levy each year, for road purposes, an *ad valorem* tax on all property of their respective counties, outside of towns, cities and taxing districts, of 2 cents on each $100 of taxable property for each day assessed to labor on public roads. Failure to work the roads as required is declared a misdemeanor.

See Session Acts 1901, Ch. 136.

It appears from this Act that counties included within its limitations have their Road Commissioners elected by the County Courts, instead of being appointed by the Governor, as provided for Knox County. While the people of Knox County, under the Act applicable to them, are subject to road service between the ages of 18 and 50 years, the people of ninety-three counties under the last mentioned Act, are subject to road service only from 21 to 45 years of age. Those subject to road service in Knox County are compelled to work the roads seven years longer than in any county having less than 70,000 population. Knox County has only a little over 70,000 population.

The people of Knox County are subject to a minimum tax of 20 cents for road and turnpike purposes, which is not proportioned at all by the tax imposed upon labor, while in counties having a population under 70,000, the tax is only 2 cents on the $100 for each day of labor assessed. These are distinct burdens and deprivations that are laid upon Knox County, to which no other county of the State is subject. Labor for road purposes is but a method of taxation to reach that class who do not pay the property tax.

It was under the color of this arbitrary, unjust, unequal and discriminative statute, applicable to Knox County alone, that the

defendants were, by mandatory injunction, as the appointees of the Governor, thrust into offices that were filled by the Relators under appointment of the County Court, as had been the custom and the law in previous time. The reasons for the enactment of this statute and its purposes will be noticed in another connection.

While this Court cannot annul this statute upon any opinion that it may entertain of its wisdom or policy, it is not inappropriate to add that this statute violates not only the letter and spirit of the constitution of the State, but in the matter of conferring the appointment of local officials upon the Governor of the State, it violates a settled public policy that has prevailed in this country from the foundation of the government.

"In an examination of American constitutional law, we shall not fail to notice the care taken and the means adopted to bring the agencies by which power is to be exercised as near as possible to the subjects upon which the power is to operate.

"In contradistinction to those governments where power is concentrated in one man, or one or more bodies of men, where supervision and active control extend to all the objects of government within the territorial limits of the State, the American system is one of complete decentralization, the primary and the vital idea of which is that local affairs shall be managed by local au thorities, and general affairs only by the central authorities. * * * It is this, also, that impels the several States, as if by common arrangement, to subdivide their territory into counties, towns, roads and school districts, and to confer upon each the powers of local legislation. * * * The system is one which almost seems a part of the very nature of the race to which we belong. A similar subdivision of the realm for the purpose of municipal government has existed in England from the earliest ages, and in America, the first settlers, as if instinctively, adopted it in their frame of government, and no other has ever supplanted it or even found advocates. In most of the colonies the central power created and provided for the organization of the towns; in one at least, the towns preceded and created the central authority; but in all the result was substantially the same, that towns, villages, boroughs, cities and counties exercised the powers of local

self-government, and the Colony or the State, the power of a more general government.

"The several State constitutions have been framed with this system in view, and the delegations of power which they make, and the express and implied restraints which they impose thereupon, can only be correctly understood and construed by keeping in view its present existence and anticipated continuance.

"There are few of the general rules of constitutional law that are not more or less affected by the fact that the powers of government are not concentrated in any one body of men, but are carefully distributed, with a view to being exercised with intelligence, economy and fidelity, and as far as possible by the persons most directly and immediately interested."

Cooley Constitutional Lim., pp. 189-191 (3rd Ed.)

These principles were also promulgated by Judge Cooley while on the Supreme bench of Michigan, in his great opinion in *People vs. Hurlburt, 24 Mich., 44: 9 Am. Rep., 103,* which has been much quoted since.

In that opinion he said: "The State may mould local institutions according to its views of policy or expediency, but local government is a matter of absolute right and the State cannot take it away."

Thomas Jefferson said: "These wards, called townships in New England, are the vital principle of our government, and have proved themselves the wisest inventions ever devised by the art of man for the perfect exercise of self-government and for its preservation. As Cato then concluded every speech with the words, *Carthageno delenda est,* so do I every opinion, 'Divide the country into wards.'"

If contrary to settled public policy and long continued usage, the people may be deprived of their cherished right of local self-government, it ought to be done by *general law* applicable to all the people of all the counties in the State, and not by an invidious statute, saddled upon a single county, by the representatives of the other ninety-five counties, who are unwilling to accept the same rule and regulation for their own constituents.

It is pertinent to quote in this connection the language of Judge Catron, the Chief Justice of the Supreme Court of Ten-

nessee, and afterwards an associate Justice of this Court, in the case of *Wally vs. Kennedy, 2 Yerger, 555, 557*, which has since been quoted and approved in opinions of this Court. Chief Justice Catron, defining the meaning of the phrase, "law of the land," which is the equivalent of "due process of law," says:

"The rights of every individual must stand or fall by the same rule or law that governs every other member of the body-politic or 'land,' under similar circumstances, and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by conferring remedies leading to the same consequences, is unconstitutional and void. *Were it otherwise, odious individuals or corporate bodies would be governed by one law, most of the community and those who make the law by another. Whereas, a general law affecting the whole community equally could not have been passed. * * * The part of the constitution referred to was intended to secure to weak and unpopular minorities and individuals, equal rights with the majorities, who from the nature of our government must exercise the legislative power. Any other construction of the constitution would set up the majority in the government as a many-headed tyrant, with capacity and power to oppress the minority at pleasure, by odious laws, binding on the latter only.*"

See VanZant vs. Waddell, 2 Yerger, 260.
Cotting vs. Goddard, 183 U. S., 79; 46 Lawyer's Ed. 92.

At the same session of the Legislature that passed this obnoxious law, another statute was passed, as stated, declaring that the Road Commissioners in Davidson County, who had been elected by the people or the County Court, should retain their offices until the next general election, and still another statute was enacted providing that Road Commissioners for all counties in the State, having less than 70,000 inhabitants, should be elected by the County Court. This last law embraces all the counties of the State, except three—Davidson, Shelby and Knox. For the County of Knox alone, it was provided that the Governor of the State should appoint these officers.

Why was this discrimination made against Knox County? At the same session of the General Assembly a commendable zeal was manifested to maintain and restore the right of home rule to

the people by the submission of a constitutional amendment making the Secretary of State elective by the people.

Session Acts 1901, Ch. 73.

By the submission of another amendment for the election of the State Treasurer and State Comptroller by the people.

Session Acts 1901, Ch. 74.

By the submission of another amendment making Clerks and Masters of the Chancery Courts elective by the people.

Session Acts 1901, Ch. 80.

And this is not all. The constitution of the State as originally promulgated in 1870, had authorized special acts applicable to counties or smaller districts, with reference to game and fish. An amendment was proposed to this clause of the constitution to enable the Legislature to pass like laws for the establishment and maintenance of public roads, and for the enactment of fence laws, and for the care and control of domestic animals.

Session Acts 1901, Ch. 79.

This last proposition is a distinct expression of opinion by the Legislature that it did not have the power to pass such special laws, without such an amendment.

The Supreme Court of the State had in a recent opinion so held, deeming the question so plain as not even to require a written opinion.

II.

ARGUMENT.

(1) *The Statute, being Chapter 8 of the Acts of 1901, regulating the public roads, turnpikes and workhouse in Knox County, and providing for the people of that county different rules and regulations, and imposing upon the citizens of that county greater burdens of taxation, both of property and labor, and subjecting them to a different rule of criminal liability, and prescribing a different method of appointment of officials from those applicable to other counties in the State, is wanting in the essentials of due process of law, and deprives the Relators of liberty or property,*

in violation of the 14th Amendment of the Constitution of the United States.

This statute is not one that deals or purports to deal with a municipality or municipalities, in reference to purely municipal affairs. It purports to be a general statute applicable to a class. It deals with the rights of the people and imposes burdens on the people, using the county merely as a unit for classification for these purposes. It deals with matters of general public interest, and such matters as are common to all the counties of the State. These matters have always been provided for by general laws, and are susceptible of general regulations, applicable to all the counties alike. It provides for matters of taxation, filling public office, etc. It has never been assumed that such an Act could be made applicable to a single county. The form of the Act in this case is a concession that a special Act, applicable to a single county, *by name*, could not be validly passed. The submission by the Legislature that passed this Act of an amendment to the Constitution, authorizing legislation of this class applicable to a single county is a concession of that body that it had no such power at the time this statute was passed.

It was assumed by counsel in the State Courts and by the Supreme Court of the State in its opinion, that no such special Act, applicable to a single county *by name* could be validly enacted. The question, therefore, whether this Act constitutes a valid law, is dependent upon the other question, whether it is based upon an admissible classification. It is confessedly class legislation. However, this is true of this Act in a limited sense.

If it be held to be based upon any classification at all, it is a classification that includes only one county and excludes all others, *taking no notice of the other counties whatever*. In determining whether the Act is valid as class legislation, the Court looks not so much to its form as to its operation and effect. The fact that it is general in form will not protect it, if it is special and arbitrary in its effect and operation.

While this Act does not name Knox County, it does the same thing by designation. The Federal Census which is referred

to, and must therefore be read into the Act, shows that neither under the Federal Census of 1890 nor under the Census of 1900, was any other county included. Nor was any other county above or below Knox County near enough to the minimum or maximum limits prescribed to be probably included in it for many years to come.

"The Act might as well have expressly named the particular objects included, to the exclusion of all others. So far as this particular provision of the Constitution is concerned, it is immaterial that the Act is general in form. The question is always as to its effect. Any other doctrine would render nugatory the prohibition of the fundamental law against special legislation. Under the guise of statutes, general in form, special legislation in effect could be adopted, with no inconvenience, and the evil to be extirpated would flourish unchecked."

Edmunds vs. Herbrandson, 14 L. R. A., 725.

"In determining whether a law is general or special, Courts will look not to its form or verbiage, but to its substance and necessary operation." *Idem.*

Nichols vs. Walton, 37 Mass., 264.

"It is not the form that the statute is made to assume, but its operation and effect, which is to determine its constitutionality."

State vs. Pugh, 43 Ohio State Rep., 98.

"A law general in its terms but applying to but one county by reason of population, etc., is void."

Devine vs. Cook County, 84 Ill., 590.

"An Act relating to Notaries, which in effect applies only to a single county, is void."

State vs. Herman, 75 Mo., 340.

"A statute fixing the salary of County Court Clerks, which in effect applies to a single county, is void."

Gibbs vs. Morgan, 39 N. J. Equity, 126.

"An Act to lay out, open and improve public roads in each county in the State is unconstitutional if one county is excepted from its operation."

State vs. Hudson County, 50 N. J. Law, 82.

In *Commonwealth vs. Patton, 88 Penn., 258,* a statute gen-

eral in form, but so worded that it could apply to only one county, was characterized as "classification run mad."

"Attempts in covert modes to defeat its (the Constitution's) plain provisions, must be set aside with the same certainty as when methods are open."

113 Pennsylvania State, 176.
State vs. Ellett, 2 Am. State Rep., 787, Note.

The case of *Cotting vs. Goddard, 183 U. S., 79: 46 Lawyer's Edition, page 92,* is strikingly in point. In that case a statute general in terms, applying to all corporations conducting a stockyards business, and having done a certain amount of business during the preceding year, was held vicious class legislation, because of the fact that it appeared that only one stockyard, to-wit, the Kansas City Stock Yard, fell within the statute, although there were others in the State doing less than the minimum amount of business prescribed.

The Court held that it was in effect the designation of the Kansas City Stock Yard, although that corporation was not named in terms. The Court stated "that it may be assumed for the purposes of the questions now to be considered that so far as the Constitution of Kansas is concerned, its Legislature may enact a law general in terms, and so phrased as necessarily to operate only upon a single individual or corporation, but while making that concession, *we cannot shut our eyes to the fact that this Act is precisely the same in its effect as though the Legislature had said in terms that the Kansas City Stock Yards alone shall be subject to its provisions.* Accepting, however, the full force of the general language in which the statute is couched, it appears that the classification is attempted between stockyards doing a large and those doing a small business. The expressed and only basis of classification is in the amount of business done by the two classes. * * * The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice Catron of this Court, in Van Zant vs. Waddell, in 2 Yerger, 262, who said: 'Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitu-

tional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the masses of the community who made the laws by another.'"

There is no doubt but that this statute was designed to embrace only one county, to-wit, Knox, and that it does embrace no other. This purpose of the act is very thinly disguised by the classification with reference to population. For this reason alone the act is arbitrary and void.

Special Acts applicable to a single county have been held void by the Supreme Court of Tennessee, in the following cases.

State vs. Bryant, 6 Heisk., 188.
Pope vs. Phifer, 3 Heisk., 683.

But regarding this law as based upon classification, the classification is utterly arbitrary and capricious The power of the Legislature to pass laws affecting classes, under certain limitations, is conceded, but in order that such class legislation shall conform to the requirement of due process of law, or be the law of the land, within the meaning of the constitutional provisions on the subject, it is essential that it be based upon classifications that are just and reasonable, and not arbitrary or capricious. This is the doctrine of the Supreme Court of Tennessee, as well as of this Court.

The doctrine as it prevails in Tennessee is nowhere better stated than in the opinion of Special Judge Ed Baxter, in the case of *Stratton Claimants vs. Morris Claimants, 89 Tenn., 534.* In that case Judge Baxter, after reviewing all of the Tennessee cases on the subject, says: "We conclude, upon a review of the cases referred to above, that whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such must be natural and not arbitrary. If the classification is made under Art. XI., Sec. 8, of the Constitution, for the purposes of conferring upon a class the benefit of some special right, privilege, immunity or exemption, there must be some good or valid reason why that particular class should alone be the recipient of the benefit. * * * If the classification is under Art. 1, Sec. 8,

everyone who is in or who may come into the situation and circumstances, *which constitute the reason for and the basis of the classification*, must be subject to the disabilities, duties, obligations and burdens imposed by the statute, or it will be partial and void, and if the classification is made under Art. XI., Sec. 8, everyone who *is in or who may come into the situation and circumstances, which constitute the reasons for and basis of the classification*, must be entitled to the rights, privileges, immunities and exemptions conferred by statute, or it will be partial and void."

Chief Justice Beasley, in *State vs. Hammer, 42 N. J. Law, 439*, has thus felicitously stated the true rule on this subject, to-wit: "But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as a basis for classification *must be of such a nature as to mark the object to be designated, as particularly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject matter of the proper legislation between the objects or places embraced in such legislation, and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree at least account for and justify the restriction of the legislation.*

14 L. R. A., 727.

In *Edmunds vs. Hebrandson, 14 L. R. A., 727*, Chief Justice Corliss uses this language on this subject, to-wit: "Where shall the line properly be traced? We believe in testing this question these inquiries should be made. Would it be unjust to include the classes or objects or the persons excluded? Would it be unnatural? Would such legislation be appropriate to them? Could it properly be made applicable? Was there any reasonable ground for excluding them? * * * The classification must be natural, not artificial. *It must stand upon some reason having regard to the character of the legislation.*"

In *R. R. vs. Ellis, 165 U. S., 150*, Mr. Justice Brewer delivering the opinion of this Court, and speaking of the classification requisite under the 14th Amendment, says: "The State cannot

say that all white men shall be subject to the payment of attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. *These are distinctions which do not furnish any particular basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis."*

And in *Waggoner vs. Bank, 170 U. S., 294,* the above language was quoted with approval, and the Court added "that classifications for legislative purposes *must have some reasonable basis upon which to stand. It must be evident that differences which would serve as a classification for some purposes, furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations.* Thus the Legislature may fix the age at which persons may be deemed competent to contract for themselves, but no one will claim that competency to contract can be made dependent upon stature or color of hair. Such a classification for such a purpose would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land."

Our own case of *Van Zant vs. Waddell, 2 Yer., 260,* and *Stratton Claimants vs. Morris Claimants, 89 Tenn., 497,* have been quoted with approval upon this subject by this Court.

Such is the general rule stated in its best form by some of the ablest Judges who have ever written upon the subject. It is moreover well settled that the Legislature is not the final arbiter on this question of classification.

"The Legislature cannot finally settle the question of the boundary to be drawn. Such a view of the organic law would bring upon this Court the just reproach that it had suffered the Legislature to disregard the constitutional barrier by relegating to it where that barrier should be set up."

14 L. R. A., 727.

The Courts will not affect to be blind to palpable infirmities

of statutes. They will not subject themselves to the reproach that they have eyes, but see not, and ears, but hear not, even for so worthy an object as saving a statute from constitutional infirmity. This was signally illustrated in the opinion of the Supreme Court of Tennessee in the case of *Sibley vs. State, 107 Tenn., 515.*

Nor is the decision of the State Court conclusive upon this Court on questions of this sort.

It is settled by numerous decisions of this Court that in determining whether a State statute is in conflict with the Constitution of the United States, this Court will proceed by original inquiry to determine the question, without bias or reference to the State decision. If this were not the law, then this Court, following the decisions of the Courts of the several States, would have as many rules of construction as are to be found in the varying decisions of the State Courts.

It is true that the Courts give much consideration and weight to classifications that have been prescribed by the Legislature, and will not lightly declare them unconstitutional. But Courts will, nevertheless, not hesitate to inquire whether the Legislature had the power in the particular case to make the classification, and whether the classification is arbitrary.

In view of these rules, we ask, what reason can be conceived of or suggested, why Knox County, *on account of its population, being between the limits of 70,000 and 90,000,* should have prescribed for it different rules with reference to the election of its Road Commissioners, or the imposition of labor and property taxation upon its citizens for road purposes, and with reference to criminal liability of its citizens, from those prescribed for the citizens of other counties of the State, having both greater and less population? Population alone is made the basis for the distinction and for the classification in this statute. The reason for the distinction must therefore be found in the differences of population of the several counties of the State. It is not enough to say that the Court will take it for granted the classification made by the Legislature is proper, if no reason can be suggested for the classification. The Court cannot determine otherwise in

such a case than that the classification is capricious and arbitrary. Counsel for the defendants did not attempt in the State Courts to suggest a reason for this arbitrary classification. The Supreme Court of the State made an effort to do so in the opinion which is printed as Appendix B to this brief.

That Court chiefly relied upon the proposition that it would not disturb the classification made by the Legislature, although the reasons for such classification were not apparent. But not feeling quite sure of its ground, added the following statement: "But it is urged that no reason has been assigned for the limitation of the operation of the Act to counties having a population of not less than 70,000 nor more than 90,000, and thus necessarily excluding the counties of Davidson and Shelby, each having a population, according to the Federal Census, largely in excess of 90,000. To this objection it may be said as to Davidson County, that the Legislature may have found as a reason for its exclusion, that it was covered by turnpikes built and controlled by private chartered companies, and in the matter of Shelby County, that the public has already perfected a network of good roads, under a system entirely satisfactory."

This suggestion of a reason for the classification is not based upon anything that is found in the record, or upon anything of which the Court can take judicial notice. *Moreover, it is not the reason upon which the classification of the statute is based.* The statute is based upon a classification according to *population*—a matter that is wholly arbitrary and has no connection that can be conceived of with the subject matter of the legislation that would justify a classification of counties along that line. Had the act been based upon a classification having reference to the suggestion of the Court, then it might possibly have been sustained, as having been based upon a reasonable and not an arbitrary classification. The basis of classification contained in the Act, to-wit, *population*, and the basis of classification suggested in the opinion of the Court, are in no wise related to each other. The Act based upon one is arbitrary. If it had been based upon the other, and had otherwise been reasonable, it might very well have been sustained.

The two classifications would not necessarily have embraced the same county or counties.

But even if the suggestion made as to Davidson and Shelby Counties, as a reason for this discriminative statute, be sufficient reason for their exclusion, what reason could exist as to the other ninety-three counties of the State? The Court has not suggested any.

The rule has sometimes been stated as though it were sufficient if the Legislature treated all that were embraced in a class in the same manner. But this principle underlies that proposition —that the class itself must be a reasonable one and must embrace all persons who come, *not merely within the class,* but *within the situation and circumstances which constitute the reason for and the basis of the classification.* And further, the reason for the classification must have *due regard to the character of the legislation.* Or, as was said by Mr. Justice Brewer in the Ellis case, *supra,* a "reasonable and just relation to the act in respect to which the classification is proposed."

See Harbison vs. Knoxville Iron Co , 103 Tenn., 423. State Ex. Rel. vs. Schlitz Brewing Co., 104 Tenn., 719.

While the principles involved were correctly stated in this latter case, the application of the rule in construing the anti-trust Act of Tennessee, which is identical with that of Illinois, has been disapproved in a recent decision of this Court.

Connelly vs. Union Sewer Pipe Co., 184 U. S., 570. 46 Lawyer's Edition, 679.

But it is said that this Act may be sustained upon the theory that it is open at both ends, and that all of the counties of the State may, by possibility, come within its provisions.

This contention assumes that this is a general Act, applicable to all the counties of the State, or that it may become so applicable. It assumes that all the counties may come to have from 70,000 to 90,000 inhabitants. Looking to the census of 1900, a copy of which is printed at Appendix C to this brief, it will be seen that Davidson County had, under that census, a population of 122,815, and Shelby County a population of 153,557. It has not been sug-

gested how these counties are to get within the classification by reducing their populations below 90,000. Even if we concede that the smaller counties—some of which had a population of only a little over 3,000—might, in the course of time, reach the minimum of 70,000, still it is difficult to conceive how the large counties might reasonably be expected to reduce their population below the maximum limit of 90,000. Nothing short of earthquake, or pestilence, or war, or other most extraordinary occurrence, could bring about this result. It may be suggested that these counties might be divided, but Davidson County has a city—Nashville—with a population of 80,865; and Shelby County a city—Memphis—of 102,320 population, according to the census of 1900, and any division of these counties that would reduce their population below 90,000 would necessitate a division of these cities. Is a classification based upon such improbabilities a natural and reasonable one? Does it not afford an extreme instance of arbitrary and capricious classification?

The opinion of the Supreme Court of Tennessee in this case, stands out in bold contrast with the former opinions of that Court. No Court has with a freer hand examined into the reasonableness of classifications than the Supreme Court of Tennessee, as will be seen by an examination of the following cases:

Morgan vs. Reed, 2 Head, 275.
Memphis vs. Fisher, 9 Baxter, 239.
Brown vs. Haywood, 4 Heisk., 360.
Wally vs. Kennedy, 2 Yerg., 554.
Bank vs. Cooper, 2 Yerg., 599.
Budd vs. State, 3 Hump., 492.
McKinney vs. Hotel Co., 13 Heisk., 104.
Daley vs. State, 13 Lea, 232.
Burkholtz vs. State, 16 Lea, 72.
Woodward vs. Bryan, 14 Lea, 522.
Neeley vs. State, 4 Lea, 316.
Green vs. State, 15 Lea, 708.
Ragio vs. State, 86 Tenn., 272.
Pope vs. Phifer, 3 Heisk., 683, 702.

The above cases are reviewed in the leading case of

Stratton Claimants vs. Morris Claimants, 89 Tenn., pp. 529, 534.

There may be added to the above list the cases of:

Halston vs. State, 12 Lea, 368.
R. R. vs. Stoval, 12 Heisk., 2.
Roane County vs. Burnett, 6 Heisk., 186.
Sutton vs. State, 96 Tenn., 696, 710.
Bank vs. Devine Grocery Co., 97 Tenn., 609.
Bacon vs. Davidson County, 104 Tenn., 317.

In all of the above cases, the Supreme Court of the State inquired into the classifications, found that they were not natural and reasonable, and for that reason declared the statutes involved absolutely void.

The case of *Burkholtz vs. State, 16 Lea, 72,* is directly in point. It was held in that case that classification by population of counties had no reasonable relation to the matter of the legislation, and for that reason the statute was declared void.

The case of *Woodward vs. Bryan, supra,* is likewise a case in which classification by population of counties was held vicious class legislation.

The cases cited in support of the opinion of the Court fall short of sustaining the Court's decision. That of *Cook vs. State, 90 Tenn., 407,* sustaining the election laws of Tennessee, based upon a classification of counties by population, was correctly decided, though the Court in that case did not go into the question of classification to any considerable extent. There are, however, abundant reasons for the enactment of more stringent election laws for the larger counties of the State, containing the large cities and centers of population, than are required for the agricultural and sparsely settled counties. Corruption in elections prevails to a larger extent in cities and other centers of population than in the agricultural districts. This was a sufficient reason, though no reason was assigned by the Court, for sustaining the classification in that case.

In the case of *Peterson vs. State, 104 Tenn., 127,* likewise cited in support of the Court's opinion, the Court sustained a no-fence law, which by its terms applied only to counties having a population of 59,000 or more. The Court found and in its opinion

states abundant reasons for sustaining such legislation in the larger counties of the State.

The case of *State, ex rel., vs. Schlitz Brewing Co., 104 Tenn., 715,* may be dismissed by the statement that this Court, passing upon an identical statute of the State of Illinois, has held that the Supreme Court of Tennessee was in error.

Connelly vs. Union Sewer Pipe Co., 184 U. S., 570 46 Lawyer's Edition, p. 679.

The case of *Luehrman vs. Taxing Dist., 2 Lea, 435,* involved a statute authorizing the incorporation of municipalities, and has no application whatever to a statute of the character of the one under consideration. The State undoubtedly has the power to create or to abolish municipal corporations, either singly or in classes, as they are mere arms of the State government. The distinction between a case that deals with municipal corporations as such and a case like the one under consideration, where the municipalities or counties are simply used as a unit of classification in dealing with the citizens, is manifest.

The case of *Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283,* is much relied upon in the opinion of the Court, but the opinion in that case discloses a classification based upon just reasons and made along proper lines, and is entirely in harmony with the principles upon which class legislation is sustained, as was held in *Connelly vs. Union Sewer Pipe Co., supra.*

It is noticeable that in none of the cases was the classification of a character that selected intermediate counties, leaving larger counties, as well as smaller ones, excluded from the class.

The classification in the Cook case and the Peterson case, *supra,* above referred to, embraces all of the larger counties from the minimum limit up. Other counties, having a smaller population, might by natural growth get into such a class. Such a classification, based upon sufficient reasons and adjusted along proper lines, may be very well sustained, as was done in those cases. But the statute under consideration is of such a character that it excludes the larger as well as the smaller counties, and requires that the larger counties shall lose from 30,000 to 80,000 popula-

tion, and in one county the division of a large city, in order to come within the classification.

If the number of the population of the county was a sufficient reason for applying this legislation to Knox County, what reason would exclude the larger counties from at once entering the class? The conclusion seems to be inevitable that this statute is vicious class legislation. It is not that due process of law required by the 14th Amendment. This objection vitiates the whole of the statute.

Does this statute deprive the Relators of liberty or property, within the meaning of the 14th Amendment?

The Relators are citizens of the county, as well as officers, and subject to the burdens of taxation imposed by statute upon the labor and property of the county. The question whether an office and its emoluments are property, within the meaning of that clause of the 14th Amendment which forbids the State to deprive any person of life, liberty or property, without due process of law, is one that has been several times before this Court. Whether the right to hold office and receive the emoluments thereof constitute "liberty" of the citizen, within the purview of said clause, does not seem to have been heretofore considered, so far as the writer of this brief has been able to ascertain.

It may be conceded that in a direct controversy between the State and its officers, the State has the power, in the absence of constitutional restrictions, to abolish an office, and deprive the incumbent of any future salary or emoluments. The controversy in this case, however, is not between the State and the Relators, for the State itself is the complaining party. The contest is between two sets of officers — the Legislature having undertaken to substitute one set for the other, and to transfer the right to the emoluments of the office, which still exists if the Act is void, from incumbents elected under the law by the County Court, to another set appointed by virtue of an unconstitutional statute.

The terms "property" and "liberty" as used in the 14th Amendment are not to be construed in their strict technical sense, in view of the history and objects of that amendment. Certainly

there is something in the nature of property in the enjoyment of office and its emoluments. There is something of liberty in the right to hold office and enjoy its emoluments. It is a worthy ambition in the citizen to aspire to office. It requires the expenditure of effort, labor and money to secure the qualifications necessary to hold and efficiently perform the duties of office. It likewise requires the expenditure of effort and money to make the contest for office. Men are prone to make greater sacrifices to get office, oftentimes, than to get money. In the view of many, office is a more valuable possession than money. Unpleasant conditions are often confronted in securing office.

Can it be justly said, in view of these conditions and considerations, that one who has been honored by public office, and thereby become entitled to its emoluments, has secured nothing of value which is protected as "property" or "liberty" under the 14th Amendment?

Whatever may be said of the right of the State to abolish and remove its officers in the exercise of its necessary power, can such right be invoked in justification of the act of the Legislature, or of any agent created by the Legislature, transferring a public office, with its emoluments, from a citizen who has been legally elected to it, to another citizen who has no claim to the office, other than that of a statute which violates the Constitution? The office still exists and the right of the incumbent to receive its emoluments remains unimpaired, if the abolishing statute violates the Constitution. Is not an existing office and a continuing right to its emoluments "property" or "liberty"?

In this connection, and with a view to ascertaining the correct meaning and intent of the words "liberty" and "property," it will not be inappropriate to refer to the history and objects of the 14th Amendment.

It is familiar learning that the first ten amendments to the Constitution were proposed by the first Congress, in fulfillment of pledges made to obviate objections to the original instrument, and secure its ratification by the States. These amendments have been not inaptly called the "Federal Bill of Rights." They

were the outgrowth of the jealousy of federal power, and of the apprehension of dangers from its abuse, entertained by the founders of our government.

These ten amendments prescribe limitations upon the powers of the General Government, but not upon the powers of the States.

The 11th and 12th Amendments, ratified in 1798 and 1804 respectively, had the same general tendency—to fortify the States against the dangers apprehended from the abuse of federal power.

With the 13th Amendment begins a new era in constitutional history. That amendment confirms the abolition of slavery.

But the 13th Amendment had not conferred the rights of citizenship upon the emancipated slaves. The immediate occasion of the 14th Amendment was to confer upon the colored race the rights of citizenship, and protect them in their enjoyment of freedom.

While this was the special object of this amendment, it likewise possesses the power and the virtue to protect citizens—white or black—in the enjoyment of their rights. This amendment was retroactive and self-executing, and annulled all constitutions and laws of the States in conflict with its provisions.

Kaukauna etc. Co. vs. Green Bay etc. Co., 142 U. S., 254.
Davis vs. Burk, 179 U. S., 399.

It was leveled against State, not individual, action.

Va. vs. Reeves, 100 U. S., 319.
Water Works vs. Sugar Co., 125 U. S., 118.

Its limitations are upon the powers of the States, and forbids action in conflict with its provisions by any of the agencies through which the States act.

R. R. Co. vs. Chicago, 166 U. S., 226.

Mr. Pomeroy, writing while this amendment was under debate, said: "It would give the nation complete power to protect its citizens against local injustice and oppression,—the power which it does not now adequately possess, but which, beyond all doubt, should be conferred upon it. Nor would it interfere with

any of the rights, privileges or functions which properly belong to the State."

Brannon on the 14th Amendment, p. 9.

The glowing words of Senator Sumner ought not to be omitted in this connection. Speaking of the 14th Amendment, he said: "These are no vain words. Within the sphere of their influence no person can be created, no person can be born, with civil or political privileges not equally enjoyed by all his fellow-citizens; nor can any institution be established recognizing distinction of birth. Here is the great charter of every human being drawing vital breath upon this soil, whatever may be his condition and whoever may be his parents. He may be poor, weak, humble, or black; he may be of Caucasian, Jewish, Indian, or Ethiopian race; he may be of French, German, English, or Irish extraction; but before the Constitution all these distinctions disappear. He is not poor, weak, humble or black; nor is he Caucasian, Jew, Indian or Ethiopian; nor is he French, German, English or Irish. He is man, the equal of his fellow-men. He is one of the children of the State, which, like an impartial parent, regards all its offspring with equal care. To some it may justly allot higher duties according to higher capacities; but it welcomes all to its equal hospitable board. The State, imitating the Divine Justice, is no respecter of persons."

The question whether the State has deprived a citizen of life, liberty or property, without due process of law, in violation of this amendment, is one that this Court always decides for itself, without reference to what may have been the determination by the State Courts.

Cohen vs. Va., 6 Wheaton, 264.
Ableman vs. Booth, 21 Howard, 506.
Tarbeles Case, 13 Wallace, 297.

It has been stated of this amendment that it protects all of the rights insured in the Declaration of Independence, including the rights of life, liberty and the "pursuit of happiness."

In view of this history and consideration of the amendment, does it afford protection to the claimant of an existing office and

its unimpaired emoluments, under the clause relating to liberty and property?

The question has been suggested whether it would protect reputation, though not decided. The matter involved in this case is of a more tangible nature than reputation.

A distinguishing feature between this case and the cases relating to office, heretofore passed upon by this Court, will be found in the fact that the attack made most of in this case is upon the validity of the statute, while the attack in the cases that we are about to review was upon the procedure of the Courts of the State. If the statute is void, the offices still exist with unimpaired right to their emoluments.

This Court has held with uniformity that it will rarely disturb the decision of a State Court, holding that a proceeding in the State Courts, had in conformity with the Constitution and laws of a State, and so declared by the Court of last resort of the State, upon the ground that it is in violation of the due process clause of the 14th Amendment. The decision of the State Courts in that class of cases is well-nigh conclusive in this Court.

It will be found on examination that most, if not all of the cases on this subject, heretofore passed upon, have been of this latter class.

The case of *Boyd vs. Nebraska, 143 U. S., 135; 36 Lawyer's Ed., 103,* was a contest over the office of Governor of that State, by a proceeding in the nature of *quo warranto.* The action was brought by Thayer against Boyd, to oust him from the office of Governor. It was insisted that Boyd was not a citizen of the United States, and therefore ineligible to the office of Governor, and incapable of holding it. The Supreme Court of the State pronounced judgment of ouster against Boyd, from which he prosecuted writ of error. This Court entertained the case, and reversed the judgment of the Supreme Court of Nebraska. The opinion of the Court was delivered by Chief Justice Fuller. This case seems to settle the question that this Court will entertain a case involving a contest over an office, for that was the only matter in controversy, and seems to settle the proposition that an

office is such a thing of value as is contemplated by the 14th Amendment. It is true that the decision of the question of whether Boyd was a citizen of the United States was incidentally involved and invoked in aid of the jurisdiction of the Court in that case, but unless the office there involved was something that was recognized as being entitled to protection under the 14th Amendment, there could have been no Federal question to sustain the jurisdiction of this Court. The office was the whole matter of controversy. This is made clear by the dissenting opinion of Mr. Justice Field, who denied the right of the Court to entertain jurisdiction of a contest over the governorship of a State, however that question may be decided by the State Courts. Unless the office was recognized as a thing of value within the 14th Amendment, then nothing of value was involved and the case presented was a "moot case."

It may be said that this contest was over the office of Governor, but the reasons of public policy against entertaining a contest of that sort are stronger than the reasons against entertaining a contest over minor offices. This Court would have no power to enforce its judgment in a contest over the office of Governor. It has abundant power to enforce its judgment in decisions over minor offices.

In *Foster vs. Kansas, 112 U. S., 201, 28 Lawyer's Ed., 629,* the Supreme Court of Kansas had, in *quo warranto* proceedings, ousted the plaintiff Foster from the office of County Attorney of Salene County, and there was presented a motion to dismiss, as well as one to affirm. This Court overruled the motion to dismiss, saying: "As the question of the constitutionality of the statute was directly raised by the defendant, and decided against him by the Court, we have jurisdiction, and the motion to dismiss must be overruled."

However, the case was affirmed on the ground that the proceedings, upon an examination by this Court, showed due process of law. This case is directly in point. In the case at bar, as in the Kansas case, the question raised is as to the constitutionality of the statute, and that was held sufficient to give this Court juris-

diction in a contest over a minor office, such as that involved in this case. That case necessarily recognized that an office is something, whether we call it "liberty" or "property," which is protected by the 14th Amendment to the Constitution. This Court could not otherwise have held that it had jurisdiction of the case.

In *Kennard vs. Louisiana, 92 U. S., 480; 23 Lawyer's Ed., 478,* it appears that Kennard was appointed a Justice of the Supreme Court of Louisiana. Morgan claimed to be entitled to that office and brought suit to settle the title to the same. The Supreme Court of the State decided in favor of Morgan, and Kennard sued out writ of error from this Court on the ground that the judgment had deprived him of his office, without due process of law, in violation of the 14th Amendment. The Court sustained the jurisdiction, but on examination of the proceedings found that there had been due process of law, and therefore affirmed the judgment of the Supreme Court of Louisiana. In that case the contest was over an appointive office. There was no other ground upon which the jurisdiction of this Court could have been sustained, except that the office is something in the nature of property or liberty, which this Court has the power to protect under the 14th Amendment. The Court could not have assumed jurisdiction and examined the question, and decided it, upon any other hypothesis.

In *Wilson vs. N. C., 169 U. S., 586; 42 Lawyer's Ed., 865,* the contest was over the office of Railroad Commissioner, an appointive office. The Court entertained the jurisdiction, saying: "The only question for us to review is whether the State, through the action of its governor and judiciary, has deprived plaintiff in error of his property, without due process of law, or denied him the equal protection of the laws." And again, "The procedure provided by a valid State law for the purpose of changing the incumbent of a State office, will not in general involve any question for review by this Court."

The Court did examine that case, and dismissed the writ of error, saying: "Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really

exist—that there is no fair color for claiming his rights under the Federal Constitution have been violated, either by depriving him of his property, without due process of law, or by denying him the equal protection of the laws."

The Court held that the proceedings by which Wilson had been removed and Caldwell appointed in his stead, were sufficient for that purpose. There is no intimation in the opinion that an office was not such "property" or "liberty" as would be protected by the 14th Amendment.

It is to be observed of this case likewise, as distinguishing it from the case at bar, that it was not a statute of the State that was assailed, but the proceedings under a statute whose validity was not attacked.

The latest case upon this subject is that of *Taylor vs. Beckham, 178 U. S., 548; 44 Lawyer's Ed., 1187.* This was a contest by *quo warranto* over the office of Governor. The petition was dismissed by the Supreme Court of the State and writ of error prosecuted. The writ of error was dismissed.—three members of the Court dissenting.

There was no assault made in that case upon the statutes of the State. The Chief Justice, delivering the opinion of the majority, said: "We do not understand the statute to be assailed as in any manner obnoxious to constitutional objection, but that plaintiffs in error complain of the action of the General Assembly under the statute and the judgment of the State Courts declining to disturb that action. * * * We repeat, then, that the contention is that, although the statue furnished due process of law, the General Assembly, in administering the statute, denied it."

This is a distinguishing feature between that case and the one at bar. The contest in the case at bar is solely over the constitutionality of the statute.

Again it is said: "It is clear that the judgment of the Court of Appeals in declining to go behind a tribunal vested by the State Constitution and laws with the ultimate determination of the right to these offices, denied no right secured by the 14th Amendment."

Nowhere in this opinion of the majority is it stated that this

Court will not, as it had done in former cases, entertain a contest over an election, as appears from the following quotation from the opinion: "And where controversies over the election of State officers have reached the State Courts in the manner provided by law, and been there determined in accordance with the State constitution and laws, the case must necessarily be *rare* in which the interference of this Court can be invoked."

Again, quoting the language of Mr. Justice Peckham, in *Wilson vs. N. C., supra,* it is said: "The procedure provided by a vaild State law for the purpose of changing an incumbent of a State office will not, *in general,* involve any question for review by this Court. A law of that kind itself should provide for the carrying out and enforcement of the policy of the State with reference to its political and internal administration, and a decision of the State Court in regard to its construction and validity will *generally* be conclusive here."

The majority opinion in that case does not determine that where, in a contest over an office, there is a question as to the constitutionality of the statute involved, that it will not entertain jurisdiction. It does not decide that this Court will not entertain jurisdiction in any case, where the subject of controversy is an office, even where the question of due process arises upon the proceedings of the State Court, which are rarely disturbed by this Court. The intimation is clearly made that there may arise cases where the Court would assume and entertain such jurisdiction. It would be, as suggested by one of the dissenting Justices in that case, a strange construction of the 14th Amendment, if it were held that a party would be protected in the right to his farm, worth $100, or to his mule, and at the same time would not be protected in the enjoyment of an office and its emoluments, which he had, by honorable effort and expenditure of money, secured.

The Court at any rate has not decided that the right to enjoy an office and to receive its emoluments is not a part of the "liberty" of the citizens of the Republic. It has not decided that the protection of the citizen in "the pursuit of happiness" afforded by that amendment is not a thing that is beyond the pale of its oper-

ation. Especially has it not been decided that the incumbent of an existing office, whose right to its emoluments has not been impaired by any valid statute, will not be protected under this Amendment. It would seem that if any case could be presented where this Court would entertain jurisdiction to protect a claimant in the enjoyment of an office and its emoluments, as against an intruder under color of an unconstitutional statute, that case is presented by this record.

But is not the right to hold office and enjoy its emoluments a part of the "liberty" of the citizen within the meaning of the 14th Amendment?

In *Allegeyer vs. La., 165 U. S., 289; 40 Lawyer's Ed., 835,* Mr. Justice Peckham, delivering the opinion of the Court, said: "The liberty mentioned in the amendment, means not only the right of the citizen to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live, to work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose enter into all contracts which may be proper, necessary and essential for carrying out to a successful conclusion the purpose above mentioned."

He quotes with approval the language of Mr. Justice Bradley from *Butcher's Union etc. Co. vs. Crescent City etc. Co., 111 U. S., 46; 28 Lawyer's Edition, 585,* as follows: "The right to follow any of the common avocations of life is an inalienable right. It was formulated as such under the phrase, 'pursuit of happiness,' which commenced with the fundamental proposition that all men are created equal, that they are endowed by their Creator with certain inalienable rights, and among these are life, liberty and the pursuit of happiness. This right is a large ingredient of the civil liberty of the citizen. * * * I hold that liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States. * * * But if it does not abridge the privileges and immunities of a citizen of

the United States, or prohibit him from pursuing his chosen calling, and giving to others the exclusive right to pursue it, it certainly does deprive him to a certain extent of his liberty, for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen."

It would seem that this definition of liberty is broad enough to embrace the right of the citizen to seek, secure and hold public office, and enjoy its emoluments. Can it be justly said that a citizen may pursue a private calling and not a public calling, as a matter of right under the Constitution of the United States, that he may secure his livelihood by pursuing a private calling, and may not do the same thing by pursuing a public calling? As a matter of sound public policy, is it not to the best interests of the public, under a government like ours, that permits every citizen to fill any office from the highest to the lowest, that all citizens should be encouraged to equip themselves for public office and to worthily seek it? It is a fact well known, that some men propose for themselves a public career and devote their energies and efforts and spend their means for that worthy end. Shall this sort of thing be discouraged by holding that public office is nothing that partakes of either liberty or property of a citizen?

While it may be conceded that there is nothing in the right to hold office or enjoy its emoluments, either as property or liberty, when the contest is directly between the incumbent of an office and the right of the State to abolish the office, and thereby relieve the public of the burden of its salary, still there is a clear distinction between that case and the one at bar.

In the case at bar, the contest is not between the State and its official, but between two sets of officials claiming the right to hold the same office, or rather to perform the same duties and enjoy the salary or compensation that the public pays. The decisions of the Supreme Court of Tennessee recognize a clear distinction between these two classes of cases. That Court has distinctly denied the right of the Legislature, by the repeal of a statute and the enactment of a new statute, to transfer an office,

its duties and emoluments, from one person to another. That Court has held such a statute unconstitutional in the case of *State, ex rel., vs. Leonard, 86 Tenn., 407.*

And that case is recognized and approved in the subsequent cases, in which it is held that the Legislature may, as between the incumbent and the State, abolish an office, and thereby remove the official and defeat his claim to salary.

The Judges Cases, 102 Tenn., 544.
State, Ex. Rel. vs. Lindsay, 103 Tenn., 635-6.

There is no substantial ground of distinction between the case at bar and the Leonard case, above cited. The effect of the legislation under consideration, was to substitute one set of officials for another set of officials, to perform the same public duties. The mere change of name or consolidation of departments makes no substantial ground for distinction. The potent fact remains that the Legislature has undertaken by repeal of a statute or statutes, under which certain officials were elected and were performing their duties and drawing compensation, to remove those officers and defeat their claim to salary or compensation, and to bestow those duties upon other individuals, and that, too, by a special, discriminatory statute that does not constitute due process of law.

The statute under consideration not only deprives Relators of office, but imposes burdens of taxation in labor and money upon them, and all other citizens of Knox County, that are not borne in an equal degree by the citizens of any other county of the State

It may be said that the offices and the revenues derived therefrom involved in this case, are too inconsiderable to demand the serious attention of this Court. Upon this point Mr. Gutherie says: "The violation of a constitutional right should never be measured or met by such a plea. It is said that counsel once attempted to argue before Chief Justice Marshall, in the particular instance before the Court, that the invasion of a constitutional right was slight, but he was sternly reminded that the case involved the Constitution of the United States, and that the degree or the extent of the invasion had no bearing upon the point.

When a constitutional right is invaded, we are not bound to stand silent, so long as moderation is practiced. There can be no greater political blindness, no more dangerous policy, than to sanction the infringement of constitutional rights because the particular instance is in itself apparently harmless, or seems expedient. Admit the wedge ever so slightly, and there is nothing to prevent its being driven home. We are not compelled to wait until the unconstitutional measure becomes ruinous confiscation, or an intolerable interference with constitutional liberties. In respect to constitutional guarantees, we have the right to expect absolute security and protection, and the Courts are under a duty to enforce the constitutional provisions, guaranteeing our rights, wholly irrespective of the degree of the infringement. Present convenience, however great, present exigencies, however tempting, can never justify the slightest disregard of any provision of a constitution. It is ever the moderate or light evasion of constitutional rights that are most dangerous."

In *Boyd vs. U. S., 116 U. S., 616,* Mr. Justice Bradley used this language: "It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of one-half their efficiency and leads to the gradual deprivation of the right as if it existed more in sound than in substance. It is the duty of the Courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

In the introduction to the letters of Junius are found these wise words: "Let me exhort and conjure you never to suffer an invasion of your Constitution, however minute the instance may appear, to pass without a determined, persevering resistance. One precedent creates another. They soon accumulate and constitute law. What yesterday was fact, to-day is doctrine. Extremities

are supposed to justify the most dangerous measures, and where they do not suit exactly, the defect is supplied by analogy. Be assured that the laws which protect us in our rights grow out of the Constitution, and that they must fall or flourish with it. This is not the cause of faction, or party, or of any individual, but the common interest of every man in Britain."

In *Sentell vs. R. R. Co., 166 U. S., 698* this Court gave grave and careful consideration to constitutional questions arising under the 14th Amendment, involving only the claim for the killing of a dog.

The case at bar is one that appeals strongly for the gravest consideration of this Court. The appeal is in behalf of and for the protection of minorities against the tyranny of majorities. Should the Court close the door against this appeal, then the Legislature of Tennessee and of other States as well, may, as often as it chooses, transfer the offices of any county in the State, whose officials are not of that political faith which agrees with the majority of the Legislature, to such persons as are of the same political faith with the majority. And this may be done by the majority, without accepting for themselves the same rules or provisions of law that they apply to the minority. Ninety-five counties pass a law for Knox County, not one of which is willing to accept the same law for its own citizens.

In this case the most plausible reason that can be suggested for the legislative action under consideration, is that Knox County, through its County Court, had elected officers that did not agree politically with the representatives of the majority of the counties in the State, and that as a consequence the majority, not accepting for themselves the law that they prescribed for Knox County, undertook to remove those officials, and by transferring the appointment to the Governor, to secure the filling of the local offices in Knox County by persons who agree politically with the majority in the Legislature and with the Governor. This precedent, if it can be sustained, as it has been by the Supreme Court of Tennessee, will be followed by the most disastrous and demoralizing consequences in the public service.

The people of counties obnoxious to the majority of the Legislature will be deprived of their right to elect their own local officials or to control their local affairs, and thereby deprived of the power to remedy or correct mal-administration of their local concerns. The appointment of their local officials will be transferred to the capital of the State, where they cannot be heard, or if heard, not heeded, because of the fact that they are in the minority. Worthy citizens of the minority will be deterred from offering for office, or voting in the elections, and thereby induced to abandon that salutary interest in public affairs which is so necessary to good government, because of the knowledge that the choice of the people will be defeated by arbitrary and oppressive legislative action, such as has been resorted to in this case. It may be said the Governor's appointees are to hold only until the next election. But the next election occurs just before the next session of the General Assembly, and that body may repeat its performance if the people should elect obnoxious officials.

(2) *The statute Chapter 8, Session Acts of 1901, denies to Relators and to the citizens of Knox County the equal protection of the laws, in contravention of the last clause of the 14th Amendment to the Federal Constitution.*

That clause forbids the State to deny to any person within its jurisdiction the equal protection of the laws.

The character of the statute under consideration has already been discussed, and need not, in this connection, be further noticed, except to say that it not only denies to the Relators the right to hold public office and to receive its emoluments, but prescribes for all the citizens of Knox County an arbitrary and discriminative rule of taxation for road purposes, and of criminal liability, applicable to all citizens of Knox County, but not applicable to any of the other ninety-five counties of the State. It is without question an unequal, arbitrary and discriminative statute.

Does it deny to the Relators and the people of Knox County the equal protection of the laws, within the meaning of that clause of the 14th Amendment above quoted?

In the consideration of this amendment, it is to be observed that the clauses preceding this particular one, protect life, liberty, property, privileges and immunities of the citizen. The framers of this section did not seem to have thought that this was enough, and added the clause quoted, securing to all persons, whether citizens or not, the equal protection of the laws. This clause must be held to mean something more and to cover something beyond what was meant and covered by the preceding clauses, relating to life, liberty, property, privileges and immunities.

The 14th Amendment was framed by the ablest lawyers, upon the most mature consideration, with infinite care, and passed through the fire of a fierce discussion before its adoption. Senator Edmunds, who was a member of the Senate when the 14th Amendment was discussed and recommended by that body, says:

"There was no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned and intended to mean the full and beneficial thing it seems to mean. There was no discussion omitted. There was no conceivable posture of affairs to the people who had it in hand which was not considered."

Guthrie on 14th Amendment, p. 25.

We must therefore find in this last clause of the 14th Amendment something more than is to be found in the preceding clauses of that section. It means something. If it does no more than to protect life, liberty, property, privileges or immunities of the citizens, certainly a very broad field, then it means nothing, and adds nothing to the efficiency of the 14th Amendment.

What then is the effect of this guaranty of the equal protection of the laws? What rights not already sufficiently protected by the preceding clauses are protected by this particular clause? It may be that it would have been efficient to protect the rights of life, liberty, property and privileges and immunities, even if the preceding clauses had not existed. But it would not have been added for these purposes alone by the able and careful draftsmen of this section. It must have the effect to protect something beyond the things named in the preceding clauses. What are those things? Is it not the right to have just and equal laws,

not only as to life, liberty, etc., but likewise as to such important matters as local self-government, the enjoyment of one's reputation unimpaired, and if not already protected by the preceding clause, the right to hold office and enjoy its emoluments, which, however, less tangible than the rights of life, liberty and property, are not less essential to the welfare of the citizen and the community? Every citizen is interested in just and equal laws. It is the right of every citizen and every community to be governed by laws that are not arbitrary and discriminating, as against themselves and in favor of other communities within the same jurisdiction. It is this right which is secured by the clause of the 14th Amendment above quoted, or it is a meaningless clause that adds nothing to the effect of the preceding clauses. Just and equal laws are the essence of liberty. The strongest guaranty of good government is the requirement that the whole community shall accept the same laws that it prescribes for its feeblest member.

Speaking of this clause of the 14th Amendment, Mr. Justice Bradley, in *Bell's Gap R. R. Co. vs. Penn., 134 U. S., 232; 33 Lawyer's Ed., 892*, among other things says: "But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unusual to the practices of our government, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases."

In *Yickwo vs. Hopkins, 118 U. S., 356; 30 Lawyer's Ed., 220*, Mr. Justice Matthews, speaking for this Court, said: "When we consider the nature and theory of our institutions and government, and principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. The first official action in this connection, declaring the foundation of government, is in these words, we hold these truths to be self-evident, that all men are created equal, that they are endowed by the Creator with certain inalienable rights, that among these are life, liberty and

the pursuit of happiness, but while these declarations of principles may not have the force of organic law, or be made the basis of judicial decision, as to the limits of right and justice, and while in all things reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter, of which the former is the thought and the spirit, and it is always expected to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions necessary to secure that equality of rights which is the foundation of free government."

In *Cotting vs. Goddard, supra,* Mr. Justice Brewer says: "It has been more than once said judicially that one of the principles upon which this government was founded is that of equality of right. It is emphasized in that clause of the 14th Amendment which prohibits any State to deny to any individual the equal protection of the laws."

It was said in the *Slaughter House Cases* that this clause of the amendment was leveled against invidious distinctions in State laws.

16 Wallace, 36.

In *Yickwo vs. Hopkins, supra,* it was said that the equal protection of the laws is "the pledge of the protection of equal laws."

This question has received an elaborate consideration in the recent case of *Connelly vs. Union Sewer Pipe Co., 184 U. S., 570; 46 Lawyer's Ed., 679.*

In an early case *(13 Federal Reporter, 740),* Judge Field, speaking of the 14th Amendment, said: "Its effect in preserving free institutions, and preventing harsh and oppressive State legislation, can hardly be overstated.

"When burdens are placed upon particular classes of individuals, while the majority of the people are exempted, little heed may be paid to the complaints of those affected. Oppression thus becomes possible and lasting. But a burdensome law operating equally upon all will soon create a movement for its repeal. With

the Amendment enforced, a bad or oppressive State law will not long be left on any statute book.

"The argument that a limitation must be given to the scope of this Amendment because of the circumstances of its origin, is without force. Its authors, seeing how possible it was for the States to oppress without relief from the Federal Government, placed in the Constitution an interdict upon their action, which makes lasting oppression of any kind by them under the form of law impossible.

"The Amendment prohibiting slavery and involuntary servitude, except as a punishment for crime, had its origin in the previous existence of African slavery. But the generality of its language makes its prohibition apply to slavery of white men as well as that of black men; and also to serfage, vassalage, villenage, peonage, and every other form of compulsory labor to minister to the pleasure, caprice or power of others."

To illustrate the hardship and danger of a denial by this Court of protection to these Relators, and through them to the complaints of all minorities against oppressive and tryannical action or measures in the State governments, we submit the following:

Suppose the existence of a State having seventy-five counties, fifty of which are democratic and twenty-five republican. Suppose a large majority of democratic voters in the State-at-large, who elect the Governor and the Judges of the higher courts and the Legislature, a majority of the latter body being of course of the democratic persuasion. Suppose that the majority in the Legislature determine to oust the republican local officials in the twenty-five republican counties, by such laws as the one enacted in this case, and transfer the power to appoint the local officers of such counties to the democratic Governor. What rights have the minority in such State, under such conditions, if a statute such as that now being considered can be maintained as free from objection for violation of the 14th Amendment? It may be said that appeal lies to the Courts of the State, but in the case supposed, the Court of last resort is of the same political tendency as

the Governor, who is constituted the appointing power, and the Legislature, which has enacted the arbitrary and discriminating statutes, which they refuse to accept for their own constituents. If not adopted to limit this sort of State action and protect the citizens of the United States against this sort of tyranny, for what purpose was the 14th Amendment promulgated?

"It is certainly (said Justice Field, in *Ah Kow vs. Nunan, 5 Sawyer, 552*) something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction, and that every blow aimed at any of them, however humble, coming from whatever quarter it may, is caught upon the broad shield of our blessed Constitution and our equal laws."

"It (14th Amendment) stands in the Constitution as a personal shield against all unequal, partial legislation by States and injustice which follows from it, whether directed against the most humble or the most ~~powerful~~ powerful, against the despised laborer of China, or the envied master of millions."

Yickwo vs. Hopkins, supra.

Leo. W. Pickle.

J. W. GREEN,
PICKLE & TURNER,
Sols. for Complainants.

APPENDIX "A."

Chapter 8, Session Acts of 1901.

"An Act to create a Board of Public Road Commissioners, to regulate the laying out and working of public roads in this State in counties having a population of not less than 70,000 nor more than 90,000, under the Federal Census of the year 1900 or any subsequent Federal Census, and to provide a method for the management and control of county workhouses in counties coming under the provisions of this Act.

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That in all counties of this State, having a population of not less than 70,000 nor more than 90,000 under the Federal Census for the year 1900, or any subsequent Federal Census, there shall be, and hereby is created a Board of Public Road Commissioners. Said Board shall be composed of three (3) members, citizens of the county, to be chosen as hereinafter set out. As soon as this Act shall take effect, the Governor shall appoint three (3) Commissioners, who shall constitute the first Board of Public Road Commissioners, and in appointing said Commissioners the Governor shall designate one of said appointees as Superintendent of Public Roads, and the others as associate members of said Road Commission. The Commissioners so appointed by the Governor shall hold their offices until the next general election of county officers, when their successors shall be elected by the people, and every two (2) years thereafter said offices shall be filled by popular election, the candidates to be designated on the official ballot by the titles herein declared. * * * "

"Section 3. * * * All male inhabitants between the ages of eighteen (18) and fifty (50) years shall be subject to road work, unless exempted by the County Court, and anyone subject to road work who shall wilfully fail or refuse to work the number of days fixed by the County Court after he has been notified as aforesaid, shall be guilty of a misdemeanor, and the contractor shall report his name to the supervisor of the district, who shall have the delinquent apprehended and brought before a justice of the peace to answer the charge of a dereliction of duty, provided,

that anyone subject to road work may commute for said labor on or before the first day of the month following the date on which he is notified by paying to the contractor fifty (50) cents a day for the time he may have failed to work. * * * "

"Section 4. Be it further enacted, That the County Court of each county, coming under the provisions of this Act, shall, at the January or April term each year levy a tax upon all property in the districts outside of the corporate limits of incorporated cities and towns, for the purpose of improving dirt roads in the county, which tax shall not be less than ten (10) cents on the one hundred dollars, nor more than twenty-five (25) on the one hundred dollars, and the County Courts in counties having macadam roads shall, at the same term, and in addition to the tax last provided for, levy a tax upon all taxable property of the county of not less than ten (10) cents on the one hundred dollars, nor more than fifteen (15) cents on the one hundred dollars, to be expended by the Commissioners herein provided for.

"First, in repairing and keeping in repair the macadam roads already built; and

"Second, in extending and constructing new macadam roads. The County Court shall also fix the number of days labor required of the road hands, which shall not be less than four (4) nor more than eight (8) days in the year."

APPENDIX "B."

CONDON vs. MALONEY.

BEARD, J. These are consolidated causes. The first is a proceeding by mandatory injunction, to compel the defendant, Maloney, as County Judge, to examine and approve the bonds of complainants as road commissioners of Knox County, they asserting claim to that office, by virtue of an appointment by the Governor, pursuant to the provisions of an Act of the last session of the Legislature. (Acts 1901, Ch. 8, p. 10.) In their bill, it is alleged, that they had tendered to the defendant, the bonds executed in all respects as required of them by Section 15 of the Act, for his approval as County Judge, and that he had declined to examine or approve them, upon the sole ground assumed by him, that the Act was void for unconstitutionality, and the prayer of the bill is that a mandatory injunction be awarded to require him to discharge the duty of examination and approval as one merely ministerial. In accordance with the prayer, a writ of mandatory injunction was awarded. Subsequently a demurrer, calling in question the right of the complainants to this injunction, and challenging the constitutionality of the Act, was filed, and upon argument overruled. The defendant, declining to make further defense, a final decree was entered, affirming the right of the complainants to the relief sought. From this decree an appeal was prayed and granted.

The second of these causes is a statutory proceeding in the nature of a *quo warranto*, brought after defendants (who are the complainants in the first named cause) had been inducted into office, as the result of the mandatory injunction referred to, on the relation of the removed officials, assailing the title of defendants to the offices of Public Road Commissioners, and seeking reinstatement of the relators. The attack of the relators on the title of the defendants is based on the assumed unconstitutionality of Ch. 8 of the Acts of 1901. Upon demurrer the bill was dismissed, and the relators appealed.

The causes were heard by the Court of Chancery Appeals, and the decree of the Chancellor in each was affirmed. From the decree of affirmance the defendant, Maloney, in the one, and

the relators, in the other of these cases, have prosecuted appeals to this Court.

The questions involved in the two causes are the same, save in the first it is insisted for the defendant, Maloney, that the action of the Chancellor in awarding the mandatory injunction was arbitrary and unauthorized, and this Court is earnestly asked to so pronounce.

Rare as is the use of this extraordinary process, yet the power of the Chancellor to grant it, in a proper case, is recognized in equity practice, and we are not prepared to say that there was here an abuse of discretion.

But if it was conceded the writ should not have been awarded, yet it appears from these records that it was obeyed by the County Judge in the examination and approval of the bonds submitted to him, and the complainants were inducted into office. This being done, the writ spent its force, and a reversal of his decree in that regard could not undo what has been done. This being so, it would be an idle ceremony, even if disapproving the Chancellor's action, to enter such a decree.

This brings us to the more serious questions raised by these appeals.

The Act, the constitutionality of which is challenged by the respective appellants, is entitled "An Act to create a Board of Public Road Commissioners, to regulate the laying out and working of public roads in this State in counties having a population of not less than 70,000 and not more than 90,000, under the Federal Census of the year 1900, or any subsequent Federal Census, and to provide a method for the management and control of county workhouses in counties coming under the provisions of this Act."

It is a well-established canon of constitutional construction, and certainly is now axiomatic in this State, that he who seeks to have a legislative act declared void on the ground that it is violative of the constitution, must be prepared to place his finger upon the clause which vitiates it. For, as was said by Caldwell, J., in *Cole Mfg. Co.* v. *Falls*, 90 Tenn., 468, "all intendments are in favor of the constitutionality of an Act of the Legislature, passed with the forms and ceremonies requisite to give it the force of law. . . . Every reasonable doubt must be solved in favor of the legislative action."

Bearing this rule in mind, we come now to the consideration of the Act in question.

In the first place, it is said that this is vicious class legislation, passed in violation of Article XI., Section 8, and Article I., Section 8, of the State Constitution, and the Fourteenth Amendment to the Federal Constitution. These several sections are so familiar it is not worth while to set them out here.

In *Harbison* v. *Knoxville Iron Co.*, 103 Tenn., 421-431, it is said that the phrase, "by the law of the land," as used in Section 8, Article I. of the State Constitution, is the exact equivalent of the terms, "due process of law," as used in the Federal Constitution, and it is asserted in the argument of the counsel for the appellants, "that whatever is forbidden as vicious class legislation by the State Constitution, is likewise forbidden by the Fourteenth Amendment to the Constitution of the United States."

We will then first refer to one or more of the leading cases, decided by the Supreme Court of the United States, involving the question of legislative classification, and ascertain the rule adopted by that Court.

In *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S., 283, was raised the question of the constitutionality of the inheritance tax law of the State of Illinois. That Act classified successions, and fixed the rate of taxation upon them, in substance as follows: 1. When the beneficial interest to any property or income therefrom should pass to or for the use of a father, mother, husband, wife, child, brother, sister, wife, or widow of the son, etc., in every such case the rate of tax should be one dollar on each one hundred dollars of the market value of the property received by such person; provided, however, that any estate of less value than twenty thousand dollars received by such person, should not be the subject of this tax. 2. When the beneficial interest to any property passed to or for the use of any uncle, aunt, etc., in any such case, the rate of such tax should be two dollars on every one hundred dollars of the market value of such property received by each person in excess of two thousand dollars so received; and (3) in all other cases the rate should be on each one hundred dollars of property received as follows: On all estates of ten thousand dollars or less, three dollars; on all estates of over ten thousand and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars, six dollars, etc.

This Act was attacked as vicious class legislation, it being insisted that it was necessarily arbitrary, and its provisions as

causing discriminations and creating inequality of burdens of taxation, in violation of the Fourteenth Amendment, which prohibits a State denying to any citizen the equal protection of the laws.

To this contention the Court, speaking through McKenna, Justice, said: "What satisfies this equality has not been, and probably never can be, defined. Generally it has been said that it 'only requires the same means to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Kentucky Railroad Tax cases, 115 U. S., 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. . . . It may be safely said that the rule prescribes no rigid equality, and permits to the discretion and wisdom of the State a wide latitude as far as interference by this Court is concerned. . . . In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

And so it was, the Court held that the Act did not impinge upon the Fourteenth Amendment, though it relieved absolutely persons who belonged to the first class, and yet came into property of a less value than twenty thousand dollars—while it placed the burden upon all others of that class succeeding to property of greater value than twenty thousand dollars, and not only placed a still heavier burden upon those belonging to the second and third classes, but graduated this burden among those belonging to these classes according to the value of their respective successions. Yet, we think, it might possibly be difficult to assign any satisfactory reason why a person of the first class, receiving an estate of twenty thousand dollars, should pay this inheritance tax, while another person of the same class, receiving a dollar less, should be relieved from it, and so with regard to the discrimination made in the other cases.

Nor did the Court attempt to assign any reason for the difference. On the contrary, it said, "There is . . . no precise application of the rule of reasonableness of classification, and the rule of equity permits many practical inequalities. . . . It only requires that the law . . . shall operate on all alike

under the same circumstances." Thus, in substance, using the language employed in so many of our cases which deal with the two clauses of the State Constitution, in question here.

In *Orient Insurance Co.* v. *Daggs*, 172 U. S., 557, was involved a statute of Missouri, providing that in suits upon policies of insurance against loss by fire, the defendant shall not be permitted to deny that the property insured was worth, at the issuance of the policy, the full amounts covered by the policy; and in case of total loss, that the measure of damages should be the amount at which the property was insured, less depreciation in value between the time of issuing the policy and at the time of the loss, and the burden of proving such depreciation should be on the defendant, etc.

It was objected that this statute was passed in violation of the Fourteenth Amendment of the Federal Constitution, in that it discriminated "as to the subject matter, as to the parties, as to the mode of trial of actions at law and equity, and imposes upon this particular class of underwriters, as distinguished from all the rest of the world, conditions which abrogate its contracts, compel it to pay damages never sustained, and prevent it from having an investigation upon the trial by due process of law."

The Court, in disposing of this contention, refers to the case of *Magoun* v. *Illinois Trust & Savings Bank, supra*, as containing a late review of the subject, and adds: "We said in that case that the State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion. And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons, or in their relations. It suffices if it is practical, and is not reviewable *unless palpably arbitrary*." The Court then concludes: "The classification of the Missouri statute is certainly not arbitrary."

Without citing other cases from that Court, it will be sufficient to say, that an examination of the United States Supreme Court Reports will show that the Court not only has failed to declare all legislative classifications to be obnoxious to the amendment in question, but, on the other hand, has recognized many State laws classifying property or persons, in their respective relations, as outside the inhibition of the amendment. The theory upon which this holding rests is thus stated by Fields, Justice: "The greater part of all legislation is special, either in the objects

sought to be attained by it, or in the extent of its application; laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, . . . laws for the irrigation and drainage of particular land, . . . are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment, requiring equal protection of the laws, because it is special in its character. . . . And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed by them, or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, . . . are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and liabilities imposed."

So we are satisfied that this Act does not in any regard infringe the Fourteenth Amendment to the Federal Constitution, as it operates upon all counties in like conditions, with uniformity, and cannot be said to be palpably arbitrary. The same rule of construction that saves it in this regard will protect it from the condemnation of Section 8 of Article I. of the Constitution of the State. For a classification is safe as against this provision, when, as this does, it embraces equally all counties which are now or hereafter may be in like condition. *Stratton* v. *Morris*, 89 Tenn., 534; *Harbison* v. *Knoxville Iron Co.*, 103 Tenn., 747.

Is the Act violative of Article XI., Section 8 of the State Constitution, in that it grants to "one individual, or individuals, rights, privileges, immunities or exemptions, other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of the law."

It applies alike to all "counties having a population of not less than 70,000 and not more than 90,000, under the Federal Census of the year 1900, and subsequent Federal Censuses." By its terms it applies with uniformity to all counties which had the requisite population at the time of the passage of the Act, and to all such as hereafter may fall within its provisions, as indicated by it.

The question of the constitutionality of legislation, providing

for a classification of towns, cities and counties, with a view to the operation of particular statutes, has long since been put at rest by the decisions of this State. Perhaps no statutes have been more stubbornly contested than those at stake in *Luehrman* v. *Taxing District*, 2 Lea, 435, and *Cook* v. *State*, 90 Tenn., 407, yet both provided for classifications, resting for population upon the Federal Census, and both were upheld.

The first of these cases called in question a series of Acts, constituting, however, a system, beginning with the Act repealing the charter of certain municipal corporations (1879, Ch. 10), and ending with the Act to establish Taxing Districts (1879, Ch. 11), and the Act amendatory thereof (1879, Ch. 84); and the second the "Dortch Law," Ch. 24, Ex. Sess., 1890.

But it is said the Acts in controversy in these cases, are to be distinguished from the one at bar in the present case.

We do not think so. We are unable to discover how the case of *Cook* v. *State*, *supra*, can be maintained, and the Act now in question be annulled as capricious and arbitrary. In essentials they are the same, and the one cannot stand while the other falls.

But it is urged that no reason has been assigned for limiting the operation of the Act to counties "having a population of not less than 70,000 and more than 90,000," and thus necessarily excluding the counties of Davidson and Shelby, each having a population, according to the Federal Census, largely in excess of 90,000. To this objection it may be said as to Davidson that the Legislature may have found as a reason for its exclusion, that it was covered by turnpikes built and controlled by private chartered companies, and in the matter of Shelby, that the public has already perfected a network of good roads, under a system entirely satisfactory.

But while the Courts frequently find and assign reason for legislative classification, yet it is by no means uniformly so. And it does not follow, because the reason for the classification is not disclosed in the face of the Act, that it is necessarily without reason and capricious. Reasons eminently wise and provident might control the law-making body, which do not appear upon the face of a statute, and for the Courts to strike it down, because not readily perceptible, might well be criticised as an act of judicial usurpation. Nor is there any abdication of constitutional duty or responsibility in this action.

The true question in each case is, is the classification capricious, unreasonable or arbitrary?

As is said in the opinion of the Court by Caldwell, J., in *State, ex rel.*, v. *Schlitz Brewing Co.*, 104 Tenn., 715, 731: "Class legislation is of two kinds, namely, that in which the classification is natural and reasonable, and that in which the classification is arbitrary and capricious." The Court tnen refers to the case of *Magoun* v. *Ill. Trust & Savings Bank, supra,* and *Orient Ins. Co.* v. *Daggs, supra,* with approval, and, with regard to classification, embodied from the latter case a sentence already quoted, that "it suffices if it is practical and is not *reviewable unless palpably arbitrary.*"

This is the latest utterance of this Court upon this vexed question, made after a careful collation and consideration of the cases, and we are satisfied of its soundness. Applying this criterion to the statute, we are satisfied that it is not "vicious classification."

But it is said this statute is void because, while general in its terms, yet as a matter of fact only the County of Knox falls within its provisions when passed.

The same objection would and in fact was made in the case of *Lucrhman* v. *Taxing District, supra,* that only the city of Memphis fell within the provisions of the Acts there in question, and in the case of *Cook* v. *State, supra,* that only two counties in the State could avail themselves of the Dortch law, and in *Peterson* v. *State,* 104 Tenn., 127, that the no-fence-law (Ch. 23, Acts 1899) applied only in counties in the State having a population of 59,000 or more by the Federal Census of 1890, etc., but in each case the objection was overruled. These cases were decided after careful deliberation, and we see no occasion to question their absolute correctness. * * *

APPENDIX "C."

The population of the several counties of Tennessee, according to the Census of 1900, was as follows:

Anderson	17,634
Bedford	23,845
Benton	11,888
Bledsoe	6,626
Blount	19,206
Bradley	15,759
Campbell	17,317
Cannon	12,121
Carroll	24,050
Carter	16,688
Cheatham	10,112
Chester	9,896
Claiborne	20,696
Clay	8,421
Cocke	19,154
Coffee	15,574
Crockett	15,867
Cumberland	8,311
Davidson	122,815
Decatur	10,439
DeKalb	16,460
Dickson	18,635
Dyer	23,776
Fayette	29,701
Fentress	6,106
Franklin	20,392
Gibson	39,408
Giles	33,035
Grainger	15,512
Greene	30,596
Grundy	7,802
Hamblen	12,728
Hamilton	61,695
Hancock	11,147
Hardeman	22,976
Hardin	19,246
Hawkins	24,267
Haywood	25,189
Henderson	18,117
Henry	24,208
Hickman	16,267
Houston	6,476
Humphreys	13,398
Jackson	16,039
James	5,407
Jefferson	18,590
Johnson	10,589
Knox	74,304
Lake	7,368
Lauderdale	21,971
Lawrence	15,402
Lewis	4,455
Lincoln	26,304
Loudon	10,838
McMinn	19,163
McNairy	17,760
Macon	12,881
Madison	36,333
Marion	17,281
Marshall	18,763
Maury	42,705
Meigs	7,491
Monroe	18,585
Montgomery	36,017
Moore	5,706
Morgan	9,875
Obion	28,286
Overton	13,353
Perry	8,800
Pickett	5,366
Polk	11,351
Putnam	16,890
Rhea	14,318
Roane	22,738
Robertson	25,029
Rutherford	33,543
Scott	11,077
Sequatchee	3,326
Sevier	22,221
Shelby	153,557
Smith	10,026
Stewart	15,224
Sullivan	24,935
Sumner	26,072
Tipton	29,273
Trousdale	16,040
Unicoi	5,851
Union	12,894
Van Buren	3,126
Warren	16,410
Washington	22,604
Wayne	12,936
Weakley	32,546
White	14,157
Williamson	36,239
Wilson	27,078